

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



# 76-1413

To be argued by  
MICHAEL D. ABZUG

## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1413

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

MICHAEL YANNICELLI,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

### BRIEF FOR THE UNITED STATES OF AMERICA

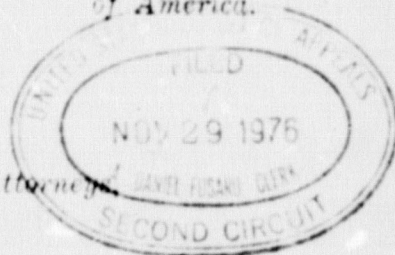
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UNITED STATES OF AMERICA,

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v.—

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*Defendant-Appellant.*

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

Michael Yannicelli appeals from an order entered on August 25, 1976, in the United States District Court for the Southern District of New York by the Honorable Henry F. Werker, United States District Judge, adjudging Yannicelli in civil contempt as a recalcitrant witness pursuant to Title 28, United States Code, Section 1826.

**Statement of Facts**

On April 14, 1976, Indictment S76 Cr. 377 was filed in the Southern District of New York charging Yannicelli with supervising an illegal gambling business in violation of Title 18, United States Code, Section 1955 and conspiring to do so in violation of Title 18, United States



Code, Section 371. Count One charged Yannicelli with conspiring to supervise the illegal activities of at least fifteen other individuals, including unindicted co-conspirator Francis J. Millow, in an illegal gambling business which accepted sports and policy wagers in Bronx and Westchester Counties from September 1, 1968, until the filing of the indictment.\* Count Two charged that Yannicelli, with the same persons, supervised the same gambling business from April 15, 1971, until the filing of the indictment.

Yannicelli pleaded guilty to both counts of Indictment S76 Cr. 377 on April 27, 1976 before the Honorable Robert L. Carter, United States District Judge. On July 8, 1976, Judge Carter sentenced Yannicelli to two one and one-half year terms of imprisonment to be served concurrently and imposed a \$10,000 fine on each count. Yannicelli was remanded on the same day to begin serving his sentence.

On July 30, 1976, a writ of habeas corpus ad testificandum was filed in the Southern District of New York directing the Warden of the Federal Correctional Institution at Danbury, Connecticut to produce Yannicelli before a Special Grand Jury empaneled in that District to give testimony in connection with an investigation into alleged violations of Title 18, United States Code, Sections 371 and 1955.\*\*

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\* Indictment S76 Cr. 377 superceded Indictment 76 Cr. 141, which was filed on February 9, 1976. The superceding indictment was virtually identical to the initial indictment except that it reduced the temporal scope of the substantive count.

\*\* Yannicelli was briefly called before the grand jury on August 16, 1976 to testify in a different investigation concerning official corruption and tax evasion. He was told he was a target of that investigation and thereafter refused to answer any questions, asserting his fifth amendment privilege. The Government did not contest his refusal to testify. (App. 12, 24-27).

Yannicelli, accompanied by his attorney, Daniel P. Hollman, appeared before the grand jury on August 23, 1976. He was advised that he had been subpoenaed "to testify in connection with [a] grand jury investigation into certain possible violations of federal law, specifically those laws prohibiting gambling in violation of Title 18, United States Code, Section 1955, and conspiring to do so in violation of Title 18, United States Code, Section 371." (App. 29).<sup>\*</sup> Yannicelli was further advised that "[s]pecifically the grand jury is interested in the activities of a man known to you by the name of Francis J. Millow, or 'Pop' Millow." (App. 29).

A copy of Indictment S76 Cr. 377 was marked as Grand Jury Exhibit No. 1. It was displayed to Yannicelli and he was told that the scope of the investigation was limited by the charges contained in that indictment. (App. 29-30). Yannicelli was asked whether he had seen Grand Jury Exhibit No. 1 before and whether he had previously pleaded guilty to the charges contained therein. He refused to answer and asked to consult with his attorney. (App. 30). Thereafter, Yannicelli returned to the grand jury room and, citing the fifth amendment privilege against self-incrimination, repeated that he would not answer. (App. 31). He was then asked the following questions:

(1) Do you know an individual by the name of Francis J. Millow?

(2) Do you know an individual by the name of Pop Millow?

(3) Do you know whether, in the past five years, Mr. Pop Millow or Mr. Francis Millow has ever accepted a policy wager?

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<sup>\*</sup> References to the appellant's appendices are abbreviated as "App."; references to the appellant's brief are abbreviated as "Br."

(4) Has Mr. Francis Millow or, as he is commonly known, Pop Millow, ever worked in a gambling operation which has been supervised by you?

Yannicelli refused to answer each of these questions. (App. 32-33). The Special Attorney explained to him that "in light of your plea to the charges contained in what has been marked into evidence as Grand Jury's Exhibit 1, you have no fifth amendment privilege to refuse to answer the questions that have just been posed to you." After a detailed explanation of the probable consequences of his refusal, the forelady directed Yannicelli to answer the last question posed to him. When he persisted in his refusal to answer, his appearance was adjourned so that he could be brought before the Part I Judge, the Honorable Henry F. Werker. (App. 33-34).

Later on August 23, 1976, Judge Werker heard the Government's application for an order compelling Yannicelli to answer the four questions asked of him in the grand jury. At the hearing the Government advised the Judge that Yannicelli had pleaded guilty to Indictment S76 Cr. 377 which charged him with supervising a gambling operation with, among others, Francis Millow, and that the questions posed to Yannicelli pertained to Millow's activity in the gambling operations charged in that indictment. Under these circumstances, the Government contended that Yannicelli could not lawfully invoke the fifth amendment. (App. 7-10).

Yannicelli claimed that his answers could be used as evidence of crimes other than those to which he had pleaded guilty. He alleged that the question which alluded to his supervisory role with Millow (question 4, *supra*) "would be something clearly within the realm of a



potential income tax violation . . ." (App. 11). His counsel also maintained that the fifth amendment would be violated if Yannicelli were compelled to answer any question about Millow's gambling activities because "that is part of a web that is going to incriminate him of some kind of federal violation and probably income tax evasion because he's going to be aware of a gambling operation of which Mr. Millow is a part and the obvious inference to be drawn from this is that Mr. Yannicelli was also a part of it since he's aware of it." (App. 15).

Judge Werker recognized that Yannicelli's knowledge of, as well as participation in, the gambling operation was already manifested in his previous guilty plea. (App. 15-16). The court thus dismissed Yannicelli's suggestion that his testimony about the participation of Millow or other of his co-conspirators in the gambling operation described in Grand Jury Exhibit No. 1 would infringe upon his constitutional rights and directed him to answer such questions. (App. 16-18). The Judge made it clear that he would not permit questions concerning transactions of money between Yannicelli and Millow and that the time span of the questions was to be limited by the dates set forth in the indictment. (App. 13-14, 17). The court also indicated that it was available to rule on any future questions which Yannicelli felt infringed upon his rights under the court's decision. (App. 17).

After ensuring that Yannicelli fully understood the consequences of unlawfully refusing to testify before the grand jury, Judge Werker ordered him to answer the four questions set forth above. (App. 18-21). Yannicelli refused to comply with the court's instruction and, upon application by the Government, was remanded to the Metropolitan Correctional Center until such time as he would testify, or until the expiration of the grand jury's



term on April 16, 1977, pursuant to Title 28, United States Code, Section 1826. (App. 21-23). The sentence imposed by Judge Carter was interrupted for the duration of the confinement for civil contempt.

On September 22, 1976, an Order was signed by the Honorable Edmund L. Palmieri, United States District Judge, changing Yannicelli's place of confinement to the Federal Correctional Institution at Danbury, Connecticut. No brief or further application for relief or hearing was filed with the District Court.

Yannicelli is presently incarcerated under Judge Werker's Order.

## ARGUMENT

### POINT I

#### **The District Court Correctly Ruled That Yannicelli's Plea of Guilty Precluded His Assertion of a Fifth Amendment Privilege to the Questions Posed.**

Yannicelli has pleaded guilty to, and has been sentenced for the crime of supervising the gambling operation about which the Government now seeks to question him before the grand jury. It is well-settled that a defendant who has been convicted of a crime has no right to remain silent on matters concerning it. *Reina v. United States*, 364 U.S. 507, 513 (1960); *In re Sadin*, 509 F.2d 1252, 1256 (2d Cir. 1975); *United States v. Reide*, 494 F.2d 644 (2d Cir. 1974); *United States v. Gernie*, 252 F.2d 664, 670 (2d Cir.), cert. denied, 356 U.S. 968 (1958); *Tempo Trucking and Transfer Corp. v. Dickinson*, 405 F. Supp. 506, 520 (E.D.N.Y. 1975).

Yet, Yannicelli refused to answer questions about the activities of one of his admitted co-conspirators when Judge

Werker ordered him to do so. He claimed, generally, that even if he was not asked directly about his own activities, his responses would incriminate him because they would reveal that he participated in the same gambling operation, and thereby subject him to the possibility of further prosecution for other federal crimes.

These arguments ignore the plain fact that Yannicelli had already admitted participating in the gambling operation; and, indeed, admitted conspiring to conduct, finance, manage, supervise, direct and own it; and, further admitted that he did, in fact, conduct, finance, manage, supervise, direct and own it. Yannicelli cannot avoid the consequences of his guilty plea. It was an admission to all of the requisite elements of the offense, *McCarthy v. United States*, 394 U.S. 459, 466 (1966), and of all the facts alleged in the indictment, *United States ex rel. Boucher v. Reincke*, 341 F.2d 977, 980 (2d Cir. 1965). See also, *United States v. Friedman*, 416 F.2d 947, 949 (7th Cir. 1969).

**A. Yannicelli had no fifth amendment right to refuse to testify whether he knew Francis J. Millow or whether Francis Millow had accepted a policy wager in the last five years**

The first three questions put to Yannicelli in the grand jury (questions 1, 2 and 3, *supra*) were strictly concerned with the activities of Francis J. Millow who was named as an unindicted co-conspirator in the indictment to which Yannicelli had pleaded guilty.

In order for Yannicelli to have legitimately refused to answer these questions on the basis of his fifth amend-

ment privilege he must have had a "reasonable cause" to apprehend danger from a direct answer. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *United States v. Reide*, 494 F.2d 644, 646 (2d Cir. 1974); *United States v. Seewald*, 450 F.2d 1159, 1163 (2d Cir. 1971). Notwithstanding this rule, Yannicelli utterly failed to explain how his answers to those questions could possibly tend to incriminate him.\*

It is evident that Yannicelli's categorical refusal to answer these questions before the grand jury on the basis of his fifth amendment privilege was contemptuous. Cf. *United States v. Seewald*, *supra* at 1162. No fifth amendment claim can justify Yannicelli's refusal to answer whether he knew Francis J. Millow. It is equally apparent that Yannicelli could not reasonably apprehend self-incrimination when he refused to answer whether Millow had accepted a policy wager in the last five years. Compare, *Hoffman v. United States*, *supra* at 486-89, *United States v. Domenech*, 476 F.2d 1229, 1231 (2d Cir.), *cert. denied*, 414 U.S. 840 (1973), *United States v. Miranti*, 253 F.2d 135, 138-39 (2d Cir. 1958) (privilege violated) with *United States v. Reide*, *supra*, 646, *United States v. Seewald*, *supra* at 1163, *United States v. Gernie*, *supra* at 670, *Tempo Trucking and Transfer Corp. v. Dickson*, *supra* at 520 (privilege not violated). Yannicelli's refusal to answer any one of these three

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\* Yannicelli made a feeble attempt to explain to Judge Werker how acknowledging whether Millow had accepted a policy wager within the past five years would incriminate him. The Court found the argument barely worth discussion. (App. 15-16). Since Yannicelli wisely does not renew that argument on appeal, he may be presumed to abandon it. *Moore v. American Scantic Line*, 121 F.2d 767, 769 (2d Cir. 1941). Yannicelli has never attempted to justify his refusal to answer whether he knew Francis J. Millow.



questions is a sufficient ground upon which to sustain his citation for contempt. *United States v. Seewald*, *supra* at 1162.

**B. Yannicelli had no fifth amendment right to refuse to answer whether Millow worked in a gambling operation which Yannicelli supervised**

Question 4 is the only question Yannicelli takes issue with on this appeal. That query was: "Has Mr. Francis Millow or, as he is commonly known, Pop Millow, ever worked in a gambling operation which has been supervised by you?" Yannicelli claimed that if he were to answer this question affirmatively he would be exposed as a "supervisor." If the Government had this evidence of his exalted status in the illegal gambling operation, he speculates, he would be liable to tax prosecution. He disingenuously asserts that the import of this question goes beyond what he admitted in his guilty plea because all he said was that he was a "gambler." This argument is without foundation. Yannicelli was not charged with mere gambling. Mere gamblers cannot violate Title 18, United States Code, Section 1955. *United States v. Becker*, 461 F.2d 230, 232 (2d Cir. 1972), *vacated on other grounds*, 417 U.S. 903 (1974). Further, it is abundantly clear from the allegations in the conspiracy count to which he pleaded guilty that Yannicelli's role in the gambling operation was in the higher echelons. Viewed in this context, it is evident that the "admission" called for by the fourth question did not exceed those already made by Yannicelli three months earlier before Judge Carter.

Yannicelli's contention that a response might tend to implicate him in an income tax law violation is therefore

without merit. Not only did he make the feared admission at the time of his plea, but there is no possibility that his admission of Millow's role in his operation could incriminate him in a prosecution for income tax evasion. Yannicelli's citation to *Shendal v. United States*, 312 F.2d 564 (9th Cir. 1963) is unpersuasive. There, a possible income tax evasion case was envisioned where the witness was asked how much money he received from another individual. *Id.* at 565-66. Here, the court specifically limited the grand jury's inquiry to matters unconnected to financial transactions between Yannicelli and his co-conspirators and indicated that if any question was posed which appeared to be outside the limits imposed by the court, Yannicelli could look to the court for fifth amendment protection.

**C. Yannicelli is protected by the constitutional prohibition against double jeopardy with respect to the spectre of other prosecutions**

Yannicelli's attempt to demonstrate his vulnerability to prosecution for interstate transmission of wagering information, interstate transportation of wagering paraphernalia, and interstate travel in aid of racketeering is not only speculative but would be barred by the fifth amendment guarantee against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436, 454-55 (1969). Compare, *United States v. Domenech*, *supra* at 1231 and *United States v. Miranti*, *supra* at 139 (substantive counts remain possible) and *United States v. Chase*, 281 F.2d 225, 229 (7th Cir. 1960) (conspiracy count remains possible). Yannicelli's responses would have been protected by the double jeopardy clause since he pleaded guilty to the indictment and since it was abundantly clear that the scope of the

grand jury's investigation and the testimony which it sought was restricted to the transactions alleged in that indictment. (App. 29-30).\*

## POINT II

### **Yannicelli Was Properly Called To Testify Before a Grand Jury Which Was Investigating Other Unrelated Criminal Allegations Against Him.**

Yannicelli complains that it was unfair to require him to testify before the same grand jury which was investigating allegations that he violated federal laws prohibiting official corruption and income tax evasion. (Br. 23). This contention is not only premature, it was never raised below. (App. 12-18). Accordingly, this Court may properly decline to consider it. *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). Moreover, Yannicelli is unable to cite a single case to support his contention.

A writ of habeas corpus ad testificandum brought Yannicelli to the Southern District of New York to testify specifically about facts concerning the violations of Title 18, United States Code, Sections 371 and 1955 to which he had already pleaded guilty. While he was here the grand jury met with respect to another, entirely different investigation concerned with official corruption and tax evasion. Inasmuch as he was a target of that investigation, he was called to testify. Yannicelli appeared before

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\* Although not mentioned by Yannicelli, it is equally evident that he could not be prosecuted for violating the New York State laws prohibiting gambling on the same facts alleged in Indictment S76 Cr. 377. N.Y. Crim. Proc. L. § 40.



that grand jury, and was warned of his target status and of his rights. He asserted the fifth amendment. The Government did not contest his assertion of the privilege against self-incrimination. There was nothing improper about his being called to testify in that investigation. It is clear that "the government is not precluded from summoning as a grand jury witness one who has become a target of inquiry or a prospective defendant." *United States v. Bonacorsa*, 528 F.2d 1218, 1223 (2d Cir. 1976); *United States v. Sweig*, 441 F.2d 114, 121 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971). Yannicelli was then called before the grand jury to testify in a continuing investigation of the gambling operation which had led to his earlier indictment, guilty plea and sentence. The inquiry was carefully circumscribed by the Government, and by Judge Werker, to fall within the scope of the admissions Yannicelli had already made. There was nothing improper about his being called to testify in this investigation. See Point I, *supra*.

Yannicelli argues that the grand jury would take the testimony "compelled" in the gambling investigation and use it against him, improperly, in the official corruption and tax investigations. This position is without basis in fact. First, the testimony was "compelled" only in the sense that he was under a lawful duty to furnish it. Assuming its relevance, the grand jury could consider it as it would any other competent evidence in its official corruption and tax investigations.\* Second, the restrictions placed on the questions by the Government and the court virtually guaranteed that nothing Yannicelli said

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\* This is not a case where "use" immunity has been granted to compel testimony. Nor will the grand jury be asked to vote an indictment on the gambling charges against Yannicelli. Indeed, such an indictment would be precluded by the double jeopardy clause of the fifth amendment.



in the gambling investigation would be relevant to the other investigations. Further, since Yannicelli was called to testify about *Millow's* unlawful activities as described in Indictment S76 Cr. 377, the evidence would not influence any prospective grand jury deliberations about Yannicelli's misconduct. Yannicelli's allegation that he would have to testify "to facts involving his activity in the gambling operations, his associations, and the method in which he does business" is without factual foundation. (Br. 23). The Government specified that the grand jury's investigation was limited to the activities of Francis J. Millow. (App. 29). The question reflected the limited nature of the inquiry. (App. 22-23). Moreover, the Government offered to limit the grand jury's inquiry to Millow's activities *without reference* to his relationship to Yannicelli. (App. 14).

Finally, Yannicelli's complaint that knowledge of his plea to syndicated gambling might unduly prejudice the grand jury's future consideration of his alleged involvement in official corruption and income tax evasion was not raised below and is wholly irrelevant to his citation for contempt.\*

### POINT III

#### **The District Court Properly Exercised Its Discretion When It Cited Yannicelli For Civil Contempt.**

Yannicelli argues that the court abuse its discretion when it incarcerated him pursuant to Title 28, United States Code, Section 1826. (Br. 20-23). He fails, however, to specify how the court erred.

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\* It should be noted, however, that the guilty plea is competent evidence as an admission, and were the gambling operation relevant to the official corruption or tax evasion investigation, the grand jury could have properly considered it.

It is plain that Judge Werker was alert to the proper limits of the questioning and ready to protect the defendant's fifth amendment rights if the occasion arose which called for such protection; and it is equally clear that there was ample cause for Judge Werker to invoke the only sanction available to the grand jury when Yannicelli spuriously asserted his fifth amendment privilege to avoid testifying, in spite of the Judge's careful, reasoned ruling.

### CONCLUSION

**The District Court's Order of Contempt should be affirmed.**

Respectfully submitted,

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AFFIDAVIT OF MAILING


STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

MICHAEL D. ABZUG being duly sworn, deposes and says that he is employed in the office of the Strike Force for the Southern District of New York.


That on the 29th day of November, 1976 he served two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

DANIEL P. HOLLMAN  
27 East 39th Street  
New York, New York 10016

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

  
MICHAEL D. ABZUG

Sworn to before me this

29th day of November, 1976  
  
WILLIAM T. ARONWALD  
Notary Public, State of New York  
No. 4505339  
Qualified in Rockland County  
Commission Expires March 30, 1977 17